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No. 03-882

IN THE
Supreme Court of the United States

THOMSON INC.,
F/K/A THOMSON MULTIMEDIA INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The government's opposition does not contest the commercial significance of levying an import-only Harbor Maintenance Tax, the constitutional importance of this Court deciding the circumstances when Congress can single out States for exemptions under the Uniformity and Port Preference Clauses, or the international ramifications of an intermediate federal court decision causing the United States to be in violation of its international trade obligations. Instead, the government intimates that petitioner seeks only error correction of the Federal Circuit's decision. But where that court holds exclusive jurisdiction over a subject matter, as it does here, there is no possibility of a square conflict among the circuits. This Court should not permit the Federal Circuit, through its exclusive jurisdiction over challenges to the Harbor Maintenance Tax, to insulate itself from review of decisions that sanction unconstitutional exactions of hundreds of millions of dollars in taxes each year.

I. THE FEDERAL CIRCUIT'S SEVERABILITY HOLDING WARRANTS REVIEW

The government's analysis of severability omits discussion of Congress's intent, which is the touchstone of whether a provision appended to an unconstitutional enactment can survive. As the petition demonstrates, Congress would not have enacted an import-only Harbor Maintenance Tax for three basic reasons: (1) Congress sought to minimize "disadvantages among cargo types *and U.S. ports*." S. Rep. No. 99-228, at 5-6 (1986) (emphasis added). Because certain ports concentrate on certain types of traffic – *i.e.*, bulk cargo (exports) versus containerized cargo (imports) – Congress sought to tax *both* imports *and* exports. *See* Pet. 10. (2) Congress specifically recognized that a tax on imports alone would cause the United States to be in violation of its international trade obligations under GATT whereas a fee on imports and exports alike would not raise similar concerns of protectionism. *See* Pet. 11. (3) The compromise reached over

the precise form of the Harbor Maintenance Tax was crucial to enactment of the WRDA. *See* Pet. 11-12. The legislative history decisively rejects the government's thesis – the Tax was not simply a revenue measure, but rather a means of raising money in a bill that involved a delicate compromise between importing and exporting interests.[1] Congress therefore never would have enacted an import-only HMT, but instead would have enacted an alternative revenue-raising measure that, like the HMT, applied to both imports and exports. *See* Pet. 13.

The government does not contest those points, choosing instead to focus on arguments that are neither germane nor persuasive. First, the government rests on the severability clause of 33 U.S.C. § 2304. But for *eight decades* this Court has consistently held that this precise language – boilerplate used in numerous statutes – is insufficient by itself to justify severing an unconstitutional provision where all other indications of intent demonstrate that Congress would not have enacted the statute that remains without the unconstitutional provision. *See* Robert L. Stern, *Separability and Separability Clauses in the Supreme Court*, 51 Harv. L. Rev. 76, 117-18 (1937) (collecting cases and noting that "it is apparent that the clause has not proved a successful means of making judicial determinations of matters of separability subject to legislative control"). *See, e.g., Dorchy v. Kansas*, 264 U.S.

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[1] The government cites (Opp. 12) as "evidence" of its contrary view of congressional intent the "additional views" of Congressman Foglietta (H.R. Rep. No. 99-251, Pt. 4, at 42 (1985)). That statement by a single representative who opposed the HMT and who served on a committee without any actual jurisdiction over the Tax is of dubious value at best. Moreover, it does not even support the government's position, because Congressman Foglietta made clear that the HMT "is only agreed upon in an attempt to break the long-standing impasse on the omnibus water resources bill and only as a last resort." *Id.* Likewise, the government's citation (Opp. 2) of S. Rep. No. 99-126 (1985) is unavailing, because that passage is at best nondescript on the question whether Congress was concerned solely with raising money or with raising money by sharing the burden among importers and exporters.

286, 290 (1924) (identically worded separability clause held to be "an aid merely" in determining congressional intent and "not an inexorable command").

Clauses identical to the one in Section 2304 have long been held not to carry the heavy weight assigned by the government. Decades ago the Court held that a provision purporting to confer power on a board to fix gasoline prices could not be severed from the rest of the statute creating the board and performing other functions notwithstanding the existence of a separability clause identical to the one at issue here. *Williams v. Standard Oil Co.*, 278 U.S. 235 (1929). As Stern explained, "[t]he more such clauses came to be attached as a matter of course to all statutes without thought as to what their effect would be, the more the courts came to treat them as the formal appendages which they often were." Stern, 51 Harv. L. Rev. at 124. Without recognizing that its position has long since been rejected by this Court, the government would disregard clear congressional intent to treat collections of the Tax on imports and exports the same way by basing its argument predominantly on language that is a "formal appendage[]" to the WRDA. *See also* Pet. 13-14 (collecting cases where this Court has rejected severability notwithstanding existence of identical or similar separability clause).

Second, the government repeatedly relies on the Federal Circuit's prior decision in *Carnival Cruise Lines* and this Court's denial of a certiorari petition in that case. Opp. 8-13. The government, however, never addresses the unassailable points that: (1) the Federal Circuit in *Carnival Cruise Lines* did not have to address the evidence of legislative intent presented in this petition showing that Congress never intended for there to be an import-only Harbor Maintenance Tax; (2) it would have been anomalous for the Federal Circuit to consider that history in *Carnival Cruise Lines* because that case considered the application of the Harbor Maintenance Tax to cruise passengers only; and (3) collections of the HMT on

cruise passengers raise only an infinitesimal amount of tax revenue, so the commercial stakes at issue in *Carnival Cruise Lines* are dwarfed by this case. Pet. 16 & n.18. Because the certiorari petition in *Carnival Cruise Lines* did not – because it could not – present the severability issue under the HMT in its constitutionally most problematic form, this case presents the last suitable opportunity for the Court to address this important question.

Third, the government's recitation about coal and computer chips simply fails to recognize that those products were stand-ins in the congressional debates for "exporters" (coal) and "importers" (computer chips). Opp. 13. As we explain in the petition (at 10 n.8), the government's position ignores that Congress was concerned about ensuring that the Harbor Maintenance Tax not discriminate between export-dependent and import-dependent *ports*. Yet such discrimination is precisely the effect of imposing a tax that operates predominantly in import-dependent container ports and not in export-reliant bulk cargo ports.[2]

Finally, the government nowhere rebuts that, as a linguistic matter, the unconstitutional export provision cannot be severed from the HMT without *adding* text. *See* Pet. 14-15. The government cites inapposite First Amendment cases for the proposition that unconstitutional *applications* may be considered apart from constitutional ones (Opp. 10), but those cases do not involve statutory language that must be judicially rewritten to save the remainder, a form of judicial activism directly

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[2] Such ports also have different types of machinery and facilities to handle those different types of cargo, which further accentuates the disparity in having post-*United States Shoe* taxation on import-oriented container ports subsidize the repair and construction at export-oriented bulk cargo ports that no longer generate revenue through the HMT but which incur costs unrelated to the needs of containerized ports. It would seem axiomatic that a so-called "user fee" paid in a container port should not be used to repair facilities in a bulk cargo port that handles exports, yet that is the gravamen of the government's theory.

inconsistent with this Court's cases. *See Reno v. ACLU*, 521 U.S. 844, 884-85 (1997). That is true even for the government's theory of "applications" (Opp. 11), because the "application" must be of a "provision" and this Court "held invalid" that *provision* in *United States Shoe*. 33 U.S.C. § 2304. The government offers no support for its contention that Congress meant for its reference to "application" in Section 2304 to authorize the rewriting of the HMT provisions to save the tax on imports, and that interpretation is all the more incongruous in light of this Court's long-standing doctrine to construe statutes to avoid bringing the United States in conflict with its international obligations. *See Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) ("an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains"); *see also Amici Curiae* Hitachi High Technologies America, Inc., *et al.* Br. 3-7 (invoking *Charming Betsy* doctrine and explaining why import-only HMT violates GATT).[3] Indeed, the government's suggested partial invalidation of the statute is "improper" where the legislature "would not have passed [the law] had it known the challenged provision was invalid." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 506-07 & n.15 (1985); *see also* Pet. 10-13.

II. THE HARBOR MAINTENANCE TAX IS A "TAX" AND NOT A "USER FEE"

The government clings to its untenable position that a levy unanimously found by this Court to be a "tax" on goods departing from America's ports is somehow *not* a tax when applied in exactly the same fashion to goods entering those ports. In making that argument, the

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[3] Even on its own terms, the government's theory founders by focusing on the wrong provisions to excise. *See* Opp. 11 (referencing 26 U.S.C. § 4461(c)(1)(A) and (B)). The provisions defining "port use" do not differentiate between import and export trade. *See* 26 U.S.C. § 4462(a)(1); Pet. 15 n.15. Thus, to adopt either of the government's theories of what to excise from the text or how to apply that text to imports would require the addition of words to the definition of port use.

government ignores most of the analysis of *United States Shoe* and instead focuses on a few sentences in the Court's opinion that are taken out of context.

The Court's purpose in *United States Shoe* of invoking *Pace v. Burgess*, 92 U.S. 372 (1876), was not to suggest that the very same tax – applied in the same manner to exports and imports alike – would change like a chameleon from a "tax" subject to constitutional scrutiny if the goods were exported into a "user fee" not subject to constitutional strictures if applied to imports. *Pace* did not address the situation presented here.

Indeed, none of the cases from this Court relied on by the government addresses a situation like the HMT, where a levy definitively found by this Court to be a "tax" under one constitutional provision is asserted not to be a "tax" under a different provision even though that charge applies in exactly the same way to imported and exported goods. As the petition explains (at 19-20), the Federal Circuit's (and the government's) position leads to the absurd result that a "tax" under one constitutional provision cannot be a subset of "tax" (an "excise") under a different constitutional provision. The government appears expressly to sanction that type of *ad hoc* constitutional analysis, which obviously has enormous interpretive consequences. Yet in making that argument – the sole purpose of which is to justify its collection of $500 million annually in taxes – the government ignores that the Harbor Maintenance Tax is explicitly denominated a "tax" in the statute and is codified as an excise tax in the Internal Revenue Code, both clear signals that the charge in fact is a "tax." *United States Shoe*, 523 U.S. at 367.

Finally, under either *United States Shoe* or the *Massachusetts* test, the government does not dispute that the Harbor Maintenance Tax bears no relation at all between the port services used and the fee imposed by the HMT – indeed, the government offers no response on that critical question. This Court stressed that the absence of any "fair approximation" between the charge and the uses to

which it was put is a clear sign that the levy is a "tax" and not a "user fee." 523 U.S. at 369 ("The value of export cargo . . . does not correlate reliably with the federal harbor services used or usable by the exporter."). On that basis alone, the HMT fails even the *Massachusetts* test. *See* Pet. 18-19, 20-22.

In addition, the revenue collected from the Tax is not fairly apportioned to the total cost to the government of the benefits conferred, which is dramatically demonstrated by the huge surpluses that are being accumulated in the HMT account for charges on imports. The government is not spending the *nearly two billion dollar* surplus that it has accumulated, and it offers no justification for the discriminatory impact the tax imposes on imported goods now that the tax on exports is no longer valid. No case from this Court has ever sanctioned such a broad disparity between the charge levied and the ostensible uses as a valid "user fee." Pet. 19.

The government claims, however, that a charge based on the value of the goods was purportedly necessary because of administrative convenience. Opp. 16. But expediency has never been a basis under either *United States Shoe* or the *Massachusetts* test for redefining a levy as a "user fee" as opposed to a "tax." *See* Pet. 21-22 (collecting cases) & n.23 (explaining Federal Circuit's inconsistency on this point). If it could, Congress would be empowered to enact unconstitutional taxes that escape critical scrutiny simply under the guise of being more "convenient" to impose. In rationalizing such a result, the Federal Circuit has simply flouted this Court's clear directive in *United States Shoe*. The issue of Congress's power – and the Executive Branch's authority – to transform unconstitutional taxes into collectible "user fees" is of paramount importance warranting this Court's review.

III. THE TAX VIOLATES THE UNIFORMITY AND PORT PREFERENCE CLAUSES

In defending the naked preferences imposed by Congress, the government simply ignores this Court's decision

in *Downes v. Bidwell*, 182 U.S. 244 (1901), which determined that a duty on goods from Puerto Rico would have violated the Uniformity and Port Preference Clauses if Puerto Rico were a State. The tax survived scrutiny not because the discrimination was held valid, but rather because the Court determined that Congress could treat Territories differently from States. *See* Pet. 24 n.25. If the same ruling were applied to the preferences made in the HMT, the Tax unquestionably would be unconstitutional. The government's position – that those constitutional clauses essentially have no teeth – should be rejected. Opp. 22. Simply because Congress has never before attempted to enact a tax as sweeping in its naked preferences for certain ports of States (as opposed to the Territory at issue in *Downes*) does not mean the Harbor Maintenance Tax should escape invalidation. *See also Amicus Curiae* American Ass'n of Exporters and Importers Br. 9-17.

The government never denies that the preferences contained in the HMT are discriminatory, but rather seeks to deflect the consequences of such discrimination by calling it "incidental" (Opp. 19) or "grounded in concerns about the burdens of geographic separation" (Opp. 20). Those contentions, of course, ignore the clear constitutional commands that "*all* Duties, Imposts and Excises shall be uniform throughout the United States," U.S. Const. art. I, § 8, cl. 1 (emphasis added), and that "*No* Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another," *id.*, art. I, § 9, cl. 6 (emphasis added). The government cites no case in which Congress has enacted a naked geographical preference specifically denominating the ports of particular States for protection and in which a court upheld that preference as "incidental" or justified by other interests.[4]

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[4] As the petition explains (at 25), the exclusion of the windfall profits tax upheld by this Court in *Ptasynski* provides no support for the holding below. Unlike the exclusion of the HMT for *all* traded goods within their applicable class in Alaska, Hawaii, parts of the Columbia

The government seeks to distinguish court of appeals cases that have articulated an approach inconsistent with that taken by the Federal Circuit, but the crucial fact in those cases was that Congress was careful *not* to enact an express preference. Rather, in each case, Congress imposed a rule that produced incidental benefits without an express geographical preference specifically favoring ports of a State in the same manner as the Harbor Maintenance Tax. *See Kansas v. United States*, 16 F.3d 436, 439 (D.C. Cir. 1994); *City of Milwaukee v. Yeutter*, 877 F.2d 540, 545 (7th Cir. 1989); *City of Houston v. FAA*, 679 F.2d 1184, 1197-98 (5th Cir. 1982). Those circuits left no doubt that there is a constitutional difference between an express preference of the type contained in the Harbor Maintenance Tax and an incidental benefit that may accrue from the geographical consequences of a tax. *But see* Opp. 22-23 & n.9 (asserting no conflict). The latter does not give rise to the constitutional difficulties of the former. The uncertainty occasioned by the disagreement in fundamental approach of four circuits, therefore, in addition to the Federal Circuit's exclusive jurisdiction over challenges to the HMT, necessitates this Court's review.

River, and other inland waterways, as Congress enacted here, the Court explained the exclusion of windfall profits in *Ptasynski* on the basis that the central problem that Congress was addressing – windfall profits from oil – simply did not exist with respect to the production of oil in pertinent parts of Alaska. 462 U.S. at 85-86. Congress is certainly entitled to make such a legislative finding, as this Court found. *Id.* at 86. Whereas the legislative history of the windfall profits tax at issue in *Ptasynski* showed no effort by Congress to create a geographical preference, *see* Pet. 25 n.27, here problems associated with port use do exist in the locations Congress exempted from the tax. Indeed, under the government's own explanation – "concerns about the burdens of geographic separation" (Opp. 20) – problems with port use are if anything *greater* in the very States afforded the naked preference. Yet the Constitution expressly forbids Congress from favoring the ports of some States against those of other States. That Congress can ameliorate perceived geographical difficulties of those States by taking actions that would be constitutional (*i.e.*, appropriations) cannot mask the unconstitutional choice Congress made in the HMT. *See* Pet. 26 n.28.

CONCLUSION

For the reasons stated herein and in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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